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RFC

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leiner Health Products Inc.

Serial No. 75/401,884

Michael A. Painter of Isaacman, Kaufman & Painter for Leiner Health Products Inc.

Marc J. Leipzig, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

Before Cissel, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On December 8, 1997, applicant filed an application to register the mark shown below

on the Principal Register in connection with "an over-the-counter pharmaceutical which relieves heartburn, acid indigestion and sour stomach," in Class 5. The basis for

filing the application was applicant's assertion that it possessed a bona fide intention to use the mark in connection with these goods in commerce.

The Examining Attorney refused registration under Section 2(d) the Lanham Act on the ground that if applicant were to use the mark it seeks to register in connection with the pharmaceutical product specified in the application, it would so resemble two registered trademarks, both of which are owned by the same business, that confusion would be likely. The first registered mark cited as a bar to the instant application is shown below.

The registration[1] identifies the products on which this mark is used as "homeopathic pharmaceutical preparations for the relief of minor anxiety, nervous tension or occasional stress, under the form of drops." The second registration[2] is for the mark shown below.

[1] Reg. No. 1,885,532, issued on the Principal Register to Lehning Enterprise Limited Liability Company France on March 21, 1995.
[2] Reg. No. 1, 912,186, issued on the Principal Register to the same company on August 15, 1995.

The goods in in that registration are identified as "homeopathic pharmaceutical preparations for the relief of cold and flu symptoms, under the form of drops." Both of the cited registrations are in Class 5.

Responsive to the refusal to register, applicant presented arguments that confusion with either of the two registered trademarks would not be likely if applicant were to use the mark it seeks to register in connection with the goods set forth in the application.

The Examining Attorney was not persuaded by applicant's arguments, however, and the refusal to register was made final in the second Office Action.

Applicant timely filed a notice of appeal. Both applicant and the Examining Attorney filed briefs on appeal, but applicant did not request an oral hearing before the Board.

Based on careful consideration of the written arguments and record in this application, we find that the refusal to register is well taken. Confusion between the cited registered marks and applicant's mark would be likely because of the related nature of the goods and the similarities of the commercial impressions created by these marks.

In order for confusion to be likely, the goods of the parties do not need to be identical or even directly competitive. All that is required is that they be related in some manner or that the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods emanate from a common source. In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Applicant seeks registration for an over-the-counter pharmaceutical product for the relief of heartburn, acid indigestion and sour stomach. The first cited registration is for pharmaceutical preparations for the relief of minor anxiety, nervous tension or occasional stress, and the second is for pharmaceutical preparations for the relief of cold and flu symptoms. These products, while not identical, are obviously commercially related. All are sold as over-the-counter remedies; none necessarily requires a prescription. All treat common physical disorders, i.e., heartburn, indigestion, nervous tension, stress and the symptoms of colds and flu. As the Examining Attorney points out, the treatment of "minor anxiety" or "nervous tension" should not be considered "totally divergent" (as applicant had put it), from the treatment of

"heartburn" or "acid indigestion." In the case at hand, the use of similar trademarks on these pharmaceutical preparations which move through the same channels of trade to the same ordinary consumers for the treatment of related minor disorders would plainly be likely to lead to confusion. Moreover, in the field of pharmaceutical products, in view of the possibility of dire consequences which could arise from taking the wrong medicine, an extra measure of care must be taken to prevent confusion. Schering Corp. v. Alza Corp., 207 USPQ 504 (TTAB 1980).

Notwithstanding applicant's argument to the contrary, the mark sought to be registered, if used on the over-the-counter pharmaceutical product specified in the application, would be likely to be confused with the two marks which are registered for related pharmaceutical preparations. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison. Rather, it is whether the marks create similar overall commercial impressions. Visual Information Institute, Inc. v. Vicon Industries Inc., 209 USPQ 179 (PTA the 1980). The focus is on the recollection of the average purchaser, who usually retains general, rather than specific, impressions of trademarks. Chemtron Corp. v. Morris Coupling & Clamp Co., 203 USPQ 537 (TTAB 1979).

The mark applicant seeks to register is essentially "L 75." The registered marks, on the other hand, are "L.72" and "L.52." There are obvious differences between these marks when they are compared next to each other, including the fact that applicant intends to present the letter "L" above the number and the fact that both registered marks incorporate a period after the letter "L," whereas applicant does not intend to do so. As noted above, however, side-by-side compasrison is not the test for likelihood of confusion. Especially when we take into account the falibility of the memories of typical consumers, when these marks are considered in their entireties, they create similar commercial impressions because they are similar in sound and appearance, and none has an apparent meaning or connotation in connection with the goods. Consumers of over-the-counter preparations for relief of minor disorders like colds, stress and indigestion would be likely to assume that the use of different two-digit numbers used after the same capital "L" is to indicate distinctions among these medications according to the particular symptoms they are intended to relieve, but these consumers would also likely assume that these similar marks indicate that all such products sold under these three marks emanate from the same source.

If we had any doubt as to whether confusion would be likely, such doubt would have to be resolved in favor of the registrant and against the applicant, who, as the newcomer, has a duty to choose a mark that would not be likely to cause confusion with the prior used and registered mark. In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); Burroughs Wellcome Co. v. Warner-Lambert Co., 203 USPQ 191 (TTAB 1979).

DECISION: The refusal to register is affirmed.

R. F. Cissel

B. A. Chapman

D. E. Bucher
Administrative Trademark Judges
Trademark Trial & Appeal Board